NO. 4051

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA STEAMSHIP COMPANY, a corporation,
Plaintiff in Error

vs.

BERNARD McHUGH,
Defendant in Error

Upon Writ of Error to the United States District Court for the District of Alaska, Division, No. 1.

BRIEF OF DEFENDANT IN ERROR

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Attorneys for Defendant in Error.

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The statement of the case by counsel for the plaintiff in error is sufficient for the purposes of this brief, and therefore no such statment is made herein. Counsel presents some forty-two assignments of error by the court below, and thereafter attempts to classify all assignments under twelve general propositions of law, which he then proceeds to argue in order as given. For brevity sake we confine ourselves to the same plan, mention hereafter being made simply to the number

of the legal principle advanced by counsel for plaintiff in error.

I

The learned judge of the court below saw fit in the trial to permit the introduction of opinion evidence as to the condition of the coal bucket used by the defendant in error in the work of unloading coal from plaintiff in error's steamship, LaTouche on the 9th of March, 1922. Counsel for plaintiff in error objects and excepts to this exercise of the court's discretion. We think the introduction of such evidence was a matter which rested in the sound discretion of the trial court, and by the better authority, such action of the trial court should not be disturbed.

Swenson v. Bender, 114, Fed. 1.

"On the same principle the opinions of machinists and artisans may be received as evidence when they have by their experience gained an acquaintance with the subject not common to others, and which may aid the court or jury in coming to a conclusion. Thus, their opinions are admissible as to the proper mode of doing work * * * or whether a certain mode of operating a given machine would be safe, as well as whether the machine itself was safe." Sec. 380, Page 478, Jones on Evidence, Civil Cases.

See also:

Central Coal & Coke Co. Williams, 173 Fed. 337.

American Car & Foundry Co. v Thornton, 183 Fed. 114.

In the case of United States Smelting Co. v Parry, 166 Fed. 408, the court, ruling upon the admission of similar evidence, said:

"The matter next to be considered is the admission, over the defendant's objection, of testimony by a practical brick-mason and builder of many years experience to the effect that a scaffold constructed and supported like the one in question was not as safe as those usually provided in like situations, but was very dangerous, because the weight of a man upon the projecting end of one of the planks was sure to make it tip. The objection made was, not that the witness was not qualified to speak as an expert, but that his opinion was elicited upon a matter which it was the province of the jury to decide, and which they were capable of deciding without such testimony. It is true that in trials by jury it is their province to determine the ultimate facts, and that the general rule is that witnesses are permitted to testify to the primary facts within their knowledge, but not to their opinions. And it is also true that this has at times led to the statement that witnesses may not give their opinions upon the ultimate facts which the jury are to decide, because that would supplant their judgment and usurp their province. But such a statement is not to be taken literally. It but reflects the general rule, which is subject to important qualifications, and never was intended to close any reasonable avenue to the truth in the investigation of questions of fact. Besides, the tendency of modern decisions is not only to give as wide a scope as is reasonably possible to the investigation of such questions, but also to accord to the trial judge a certain discretion in determining what testimony has a tendency to establish the ultimate facts, and to disturb his decision admitting testimony of that character

only when it plainly appears that the testimony had no legitimate bearing upon the questions at issue and was calculated to prejudice the minds of the jurors." Citing: Holmes v Goldsmith, 147 U. S. 150, 37 L. Ed. 118. Williamson v United States, 207 U. S. 425; 52 L. Ed 278. Alexander v United States, 138 U. S. 353; 34 L. Ed. 954. Moore v United States, 150 U. S. 57, 37 L. Ed. 996. Clune v. United States, 159 U. S. 590, 40 L. Ed. 269. And it is in keeping with this modern tendency that it is now generally held, as stated in Chicago Great Western Ry. Co. v. McDonough (C. C. A.) 161 Fed. 657, 662, and in the cases therein cited, that whether or not a witness tendered as an expert is qualified to testify as such rests largely in the discretion of the trial judge, and that his opinion thereon ought not to be disturbed, unless it can be said that it was manifestly erroneous.

United States Smelting Co. v. Parry, 166 Fed. 407.

Counsel for plaintiff in error cites the case of Spokane & I. E. R. Co., v. U. S., 210 Fed. 243, L. R. A. 1917 A, 558-563, affirmed 241 U. S. 344; 60 L. Ed. 1037, in support of the proposition that the facts alone should have been described to the jury and the conclusion left for them to draw. The case is not in point, the question there being whether a certain appliance satisfied the requirements of the Safety Appliance Act, and not whether the appliance itself was in a safe or unsafe condition as such.

II

In the argument of the second proposition on page 35 counsel for defendant seemed not to have understood the purpose for which it was

attempted to secure the testimony objected and to which they point as error.

Beginning at page 189, Transcript, the witness McHugh was interrogated in some detail with regard to the extent and value of his work and labor in Alaska prior to the injury sued on, where he had worked, for whom, what wages he had received, what kind of work he was engaged in,—all for the purpose of fixing a standard by which the jury could determine his labor-worth prior to his injury. After a break in his testimony, by the examination of another witness out of order, at page 216, Transcript, he was called back on the stand and fully interrogated about his capacity for labor and his labor-worth and income after the injury sued for, for the purpose of giving the jury the fair standard of damage he had thus suffered in his actual earning capacity, by a comparison of his income before and after the injury.

On page 216, Transcript, he was asked:

Q. "Mr. McHugh, I wish you would tell the jury about how much money you have received for your labor that you have recounted to the jury, per annum—per year—since you have been in Alaska."

A. "About $1800 or $2000 a year."

Q. "Prior to the time you were hurt?"

A. "Yes, sir."

Q. "Now since that time what have you received?"

A. "Since the time I got hurt?" A. "Yes."

A. "I received nothing; I received charity.

Q. "From whom?" A. "I received charity from—"

Mr. Robertson (interrupting): "I object to that as incompetent, irrelevant and immaterial."

And after discussion between counsel and the judge the objection was sustained. The court, however, being cognizant of the purpose counsel had in trying to show the ability to earn before, in comparison with the ability to earn after the injury, on page 218, Transcript, ruled:

A. The Court—"Well, you can show a part of that, but I don't think it is relevant from whom he received it. You can show why his living was contributed to, but not the people I don't think it is irrelevant."

Q. "Will you state to the jury, then, Mr. McHugh, why you have had to receive contributions or charity from other people?"

Objection was made, but overruled and counsel said:

Q. Go ahead and state why you had to receive money that way."

A. "I had to receive money for the reason that I was unable to limp fifty yards in any half hour from the time I left the hospital, for a few months after I left the hospital. I was unable to work, and I had no money; at the time I left the hospital I had only $28 of my own and other money I received afterwards, of course. I had to borrow it; that I must have in order to live."

The whole of the record about this matter will be found at pages 216-219, Transcript. The court will notice, page 216, that the word "charity" was not brought out by any question put by counsel, but was a thoughtless remark interject-

ed by defendant in an attempt to convince the court that he was not able to earn money after the injury. The statement was a surprise to counsel for plaintiff, who did not even then perceive the slant of the matter, though the court did, and sustained the objection so far as it seemed objectionable.

The witness was led to use that particular phrase, too, as an answer to the knowledge he possessed that defendant's attorneys were gathering evidence to charge him with drunkenness and other useless expenditures of money, after the injury, as was done at pages 275, 276, 355, 357 to 367, Transcript, and merely denied these charges in advance of their being offered, as they come later, by saying he had no money—that he had to borrow money from his friends, and that since the injury he was unable to work, and had to borrow money to live on.

Counsel for defendant did not move to strike nor ask for an instruction to the jury on that point, and thereby waived it.

28 Cyc. pp. 1691, 1695, 1696, Trials.

The court of its own motion gave the jury instruction No. XXVI warning the jury against being prejudiced for or against the party to the action, Page 431, Transcript. Defendant did not ask for instruction, and abandoned his objection thereby.

Hume v. United States. 170 U. S. 210; 42 L. Ed. 1011.

III

The third point made by counsel for plaintiff in error that "evidence of accidents happening after plaintiff's injury was irrevelant and inadmissible," is not without exceptions.

The general rules in such cases and the authorities in support thereof, are collected in Cyc. Vol. 29 at pages 614 to 619.

"Evidence of the condition of the place where plaintiff was injured within a reasonable time after the accident—

Little Rock, R. Co. v. Eubanks. 48 Ark. 460. 3 SW. 808.

3 Am. St. Rep. 246, twenty-one months after too remote.

Bloomington v. Osterle, 139 Ill. 120. 28 N. E. 1068. two weeks after not unreasonable time.

Lauter v. Duckworth, 19 Ind. App. 535. 48 N. E. 864, sixteen months after too remote.

Johnson v. St. Paul. 52 Minn. 364. 54 N. W. 735, four weeks after not unreasonable time.

—"is admissible for the purpose of showing its condition at the time of the injury—

Note 44 and citations p. 915. 29 Cyc.

—"in the absence of evidence of a change in the meantime.—

Note 45 and citations, p. 915. 29 Cyc.

"Acts of defendant after an accident alleged to have resulted from his negligence and are not

admissible to show antecedent negligence. The words and manner of defendant immediately after the accident are, however, admissible as part of the *res gestae*, and to show the defective condition of defendants property plaintiff may show manifestations of such property, capable of producing injury, occurring after the injury complained of.

29 Cyc. page 615 and notes 43-49.

The offer of the testimony complained about in this case was to show the conditions of the property at the very time of the injury in this case, that it was capable of producing the injury to plaintiff while yet used at the moment, and within an hour—it was part of the res gestae.

Counsel for plaintiff in error cites Columbia R. R. Co. v. Hawthorne 144. U. S. 202. 36 L. Ed. 405 in support of this proposition—that evidence of accident happening after plaintiff's injury was irrelevant and inadmissible. That, however, was not the point decided in the case of Columbia v. Hawthorne; the point decided then was (italics mine):

"In an action for injuries caused by a machine alleged to be negligently constructed, *a subsequent alteration or repair of the machine* by the defendant is not competent evidence of negligence in its original construction."

There was no such evidence attempted to be offered in this case—the evidence was that the defendant continued to use the bucket, whose mechanism caused the injury, for an hour after the injury occurred and then laid it aside—there

was no evidence offered of "subsequent alteration or repair of the machine" and, therefore, this case is not in point on that proposition.

In the case of District of Columbia v. Armes, 107 U. S. 520; 27 L. Ed. 620, a member of the Metropolitan police was asked as to other accidents occurring on the spot where the defendant in error was injured. Over the objection of the city's counsel the court allowed the question to be answered in the affirmative and the Supreme Court on this point said:

"The admission of this testimony is now urged as error; the point of the objection being that it tended to introduce collateral issues and thus misled the jury from the matter directly in controversy. Were such the case, the objection would be tenable; but no dispute was made as to these accidents, no question was raised as to the extent of the injuries received; no point was made upon them; no recovery was sought by reason of them; nor any increase of damages. They were proved simply as circumstances which, with other evidence, tended to show the dangerous character of the sidewalk in its unguarded condition."

In passing, it is worthy of note that counsel for the plaintiff in error himself, in the re-direct examination of the witness Pollow, appearing at Page 329 of the transcript in this case, asked the following questions and received the following answers:

Q. "Now, how did these other men get hurt, Mr. Pollow?"

A. "They were doing just what I told them

not to do—pulling on the bail, pulling backwards against the pile."

Q. "Where were you?"

A. "I was standing right on the coal pile, right in the opening of the hatch."

Q. "Now then, how soon after McHugh came up out of the hold and you found out he was injured, did you say you went down into the hold?"

A. "Probably fifteen minutes."

"By the weight of authority, evidence of other accidents or injuries occurring from the same cause is admissible to show that a defect in the property existed, and the possibility or probability that the injury complained of resulted therefrom."

29 C Y C 611-612.

IV

The fourth proposition presented in counsel's brief and argument is that "evidence of changes, repairs and precautions subsequent to plaintiff's injury was irrelevant and inadmissible" and counsel again quotes from Columbia R. R. Co. v. Hawthorne, supra, on the point that evidence of *"a subsequent alteration or repair of the machine* by the defendant is not competent evidence of negligence in its original construction."

Of course, no such evidence was offered by the plaintiff. True plaintiff's witness Williams was asked at page 138:

Q. "Was there any change made in the bucket after Barney was hurt?"

That question related to the immediate time

and was intended to bring out the fact that the buckets were so changed that the one which produced the injury was laid aside and no longer used.

This purpose was clearly stated by counsel for the plaintiff at the top of page 138, Transcript, when the objection was first made, as follows:

"Mr. Wickersham (interrupting)—I want to show simply that the bucket was laid aside."

The witness understood the question and replied:

"A. Well, not very long afterwards they took the bucket and laid it aside—the same bucket I was using. That left four men to the bucket and they put me on the hook." Transcript p. 138.

Other inquiries about the bucket after the injury of plaintiff, had reference to the immediate time, all within one hour after the injury sued for, and while the bucket was in the same identical condition it was when the injury took place. The evidence related to the *res gestae*,—the conditions at the very time the injury happened and before any change was made in the machinery or bucket.

We also call the attention of the court to the evidence offered by the defendant (plaintiff in error here) at page 313 Transcript, when they asked their own principal witness:

Q. "Mr. Pollow, did you have any occasion during that night or the early morning of March

9, 1922 to examine this particular coal tub about which you have testified?"

A. "Yes, about an hour after the accident."

On the next page (Tr. 314) Pollow testified:

A. " * * * and I threw the bucket to one side that they couldn't use it any more."

Q. "How long was that after McHugh was hurt?"

A. "Well, I don't know exactly. It was about an hour."

So that all this class of testimony, as to what happened to this bucket after McHugh was hurt, related to a time within one hour after the injury, and before the bucket was discarded by the defendant's mate in charge of the unloading of the coal. It was a part of the *res gestae*.

V

Counsel's fifth general proposition is as follows: "The defendant (plaintiff in error) was entitled to cross examine plaintiff's witness as to the positiveness of his testimony." The alleged error is claimed to have occurred in the cross examination of the witness Young as shown at page 126 of the transcript. No exception was taken by counsel, nor was an objection to the ruling of the trial court made by him.

Patterson v. Hamilton, 274 Fed. 363.

The colloquy was as follows:

Q. "Do you feel as positive of that as anything else you have said in your testimony?"

Mr. Wickersham: "Oh, I object to that.

The Court: "Objection sustained."

Q. Do you feel that you might be mistaken about that Mr. Young?"

A. "I might be mistaken with reference to

the position of the winch drivers on the deck, yes."

Transcript 126-127.

So if it was error it was not objected to, and was cured in the next breath by the next succeeding questions and answers.

VI

Counsels sixth general proposition is as follows: "The defendant was entitled to offer evidence in rebuttal of plaintiff." This proposition is based upon the supposed error of the trial judge in sustaining objections made by counsel for plaintiff to questions put to one Dr. Story at page 345, Transcript. But an examination of the record at that page discloses that counsel for defendant took no exception in any manner to the ruling of the court, and error cannot, of course, be based on it·

The questions asked in that paragraph are of themselves a sufficient answer to the assignment, even if there had been an exception, for they are hypothetical and not based on any evidence in the case, are leading and suggestive and had been previously substantially answered several times.

Patterson v. Hamilton. 274. Fad. 363.

VII

The seventh proposition in the brief of the plaintiff in error that "Instructions must be based upon evidence, and not upon abstract propositions of law," seems correct enough as an

abstract proposition of law, but hardly justifies an argument of the facts submitted to the jury. He bases the argument of error on the assertion that there was no evidence "to go to the jury as to the place of work being dark and badly lighted." "An examination of the record will not disclose, we believe, any evidence upon which to base the instruction." Page 47, brief. He then proceeds to quote plaintiffs witnesses Young and Klemm about the matter, and defendant's witness Pollow, and to reargue the case. Plaintiff's witnesses, Young and Klemm, both worked on the hopper, 40 feet above the hold, from which the coal bucket ascended to them for dumping, and into which both could look, and they testified as follows:

Klemm complained to the mate about the defective bucket and on cross-examination by Mr. Robertson, for defendant:

Q. "Who did you tell that to?"
A. "Why I spoke to the mate."
Q. "Who was the mate?"
A. "Well, I couldn't tell you. It was dark down there. I couldn't recognize the mate from where I was."
Q. "How far were you away from him where you were?"
A. "I was probably thirty or forty feet. Thirty or thirty-five feet."

Page 215, Transcript.

Witness Young testified at greater length at pages 76 and 77 about light. He worked from noon till midnight, and after describing the gen-

eral darkness after 7 o'clock that night, and the want of lights near his work, testified, page 77:

Q. "What lights were below you on the boat, that you could see?"

A. "Just the lights in the hatch for the men at work."

Q. "How dark was it between you and the hatch?"

A. "Well, where I was standing it was dark; that is, after it became dark."

Q. "Well, in general, was it light or dark or unusual?"

A. "Quite dark, I would say."

Pages 76, 77, Transcript.

While the matter of bad lighting was one of the issues in the case it was not the main issue presented by the pleadings and evidence. The main issue had relation to the defective appliance provided for hoisting the coal out of the hold,—the iron bucket,—and there was ample evidence presented on that matter, and even if the evidence with respect to the want of light was not conclusive, in the estimation of the defendants counsel, the verdict is sufficiently supported by that presented in respect to the defective bucket. Plaintiff was entitled to recover on that branch of his case, even though the court should think there was scant evidence on the other, which we do not admit. Anyway there was the allegation, the theory and legal evidence in support of it, and it was the duty of the court to instruct on it as he did.

Counsel also complains in the latter part of his seventh general proposition (page 48, brief) that there was no evidence upon which to submit to the jury the matter of a permanent injury to McHugh's foot, and that the instructions, doing so, was based upon an abstract proposition of law, and therefore error.

The matter of the permanency of this injury was fully testified to by the defendant McHugh at pages 228-230, Transcript. Dr. Mustard's testimony on the same matter will be found at pages 234-239, Transcript. He testified to a bony growth between the first and second metatarsal bones of the foot—or rather on the first metatarsal bone. At page 234 the physician said of this injury:

A. "When I first saw him there was a good deal of inflammation of the lining of the membrane of the first metatarsal—the perosteum—an inflammation that is known as periostitis. This was quite severe and acute and has remained acute and severe for a good many months since that time. More recently it has become sub-acute and now the condition is what would be described as chronic."

The character of the growth is described at the bottom of page 325 and page 326, Transcript, as follows:

Q. "Is there a deposit of bone on the outside of the other bone?"

A. "The outside of the other bone, but be-

neath the lining of the membrane of the bone."

Q. "What does it resemble — a swelling or—"

A. "It is newly formed bone."

At the bottom of page 236, Transcript.

Q. "When will he recover from this growth of bone? Will it ever disappear?" A. "No, sir."

Q. "It will remain with him as long as he lives?"

A. "Yes, sir."

At the top of page 239, Transcript.

Q. "Can you state to the jury whether or not that bony deposit will ever disappear?"

A. "It will never disappear."

Certainly there is evidence in support of both the bad lighting in and around the working place in the ship, and in support of the permanence of the injury to the defendant's foot, and there was no error in submitting both questions to the jury by proper instructions.

VIII

The eighth proposition in the Brief for the Plaintiff in Error (the defendant below) is that "The Act of June 11, 1906, Chap. 3073. 34 Stal. L. 232, known as the first Employer's Liability Act, was unapplicable to this case."

Counsel attempts to demonstrate that the first Act was inapplicable only because it was repealed by the later Act. At page 54 of their brief counsel says: "So far as we are informed the United States Supreme Court has never had occasion to directly pass upon the question as to whether or not the Act of June 11, 1906 was so

repealed by the Act of April 22, 1908." There is no repealing clause in the latter Act, so if the former Act was repealed it was by implication, a method of repeal which is not looked upon with special favor by the courts.

The Act of 1906 applies to all common carriers in the Territory of Alaska, and is not unconstitutional there. El Paso Ry. Co. v. Gutierrez. 215, U. S. 87. 54 L. Ed. 106. Note 1, Sec. 8657 Vol. 8. Comp. Stat. U. S. 1916. Page 8389. Its provisions apply to the circumstances in the case at bar. The Act of 1908 has no relation to the case at bar, and if the Act of 1906 was repealed by implication by the Act of 1908, then neither Act applies. We think, however, that Section 8 of the Act of 1908, Sec. 8664, U. S. Comp. Stat. 1916, Vol. 8, Page 9439, continues the Act of 1906 in force.

"Sec. 8664—Nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employers under any other Act or Acts of Congress, etc."

Whatever the court may think about the matter of implied repeal of the Act of 1906, the matter before the court is aided by the fact that in 1913 the Legislature of Alaska re-enacted the Act of Congress of 1906. Sess. Laws of Alaska, 1913, page 84. Sec. one and two of the Act of the Territorial Legislature are as follows: the phrases therein which are exactly taken from the Act of Congress of 1906. 34 Stat. L. 232 are italicised.

"Chap. 45.—An Act to fix the liability of employers for personal injuries sustained by their employees.

"Be it enacted, etc."

Section 1. *That every* person, association, or corporation engaged in the business of manufacturing, mining, constructing,, building, or other occupations carried on by means of machinery or mechanical appliances *shall be liable to any of its employees, or, in the event of his death, to his personal representation for the benefit of his widow and children, if any, if none then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its* or his or their *officers, agents, or employers, or by reason of any defect or insufficiency due to its* or their *negligence* in the machinery, appliances and works."

Sec. 2. *That in all actions hereafter brought against* a master or employer such as is mentioned in the first section hereof, *to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery when his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury."*

Sess. Laws Alaska. 1913, Page 84.

This Act of the Territorial Legislature is valid under the 9th section of the Act of Congress of Aug. 24, 1912, to create a legislative as-

sembly in the Territory of Alaska and to confer legislative power thereon. 37 Stat. L. 512. Sec. 416. Comp. Laws Alaska. 1913, and the rules laid down in the case of Clinton v. Englebrecht, 13. Wall. 434, 20 L. Ed. 659.

The Act of the Territorial Legislature is valid, first, because it is within the legislative power conferred by Congress in section 9 of the organic act, and, second, because it has been approved by Congress, under the provisions of Sec. 20 of the organic act:

"Sec. 20. That all laws passed by the Legislature of the Territory of Alaska shall be submitted to the Congress by the President of the United States, and if disapproved by Congress, they shall be null and of no effect."

Sec. 426, Comp. Laws Alaska, 1813, page 273.

In an exactly similar situation the Supreme Court of the United States in Clinton v Englebrecht, supra, said:

"In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute books for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the secretary of the territory to transmit to that body copies of all laws, on or before the first of next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

It is more than ten years since the Territorial Act of 1913 was passed; four sessions of Con-

gress have passed, and under the rule above laid down by the Supreme Court, this court will, of course, hold the present Act to have been "approved by that body," and therefore a valid law.

IX

Counsel's ninth general proposition is that the common law doctrine of the assumption of risk applied, and that the circumstances show the plaintiff necessarily assumed the risks of the employment in which he was injured.

Swenson v. Bender. 114, Fed. 1.

The facts show that McHugh began work at 7 o'clock in the evening, and worked till 12—then had an hour off for eating and rest, and began work again at one o'clock and was injured twenty minutes later, after having worked only five hours and twenty minutes. Page 205-210, Tr. The evidence shows without contradiction that he had never had any experience in handling a coal bucket or its catch or lock before, and that the whole mechanism was new to him and was not even handled by him during the short time of his employment. Pages 205-209, Transcript.

The coal tub was about three feet square, built of iron and weighed about 600 pounds. Page 80, Transcript. The bail was of heavy iron, about three inches wide, and an inch and a quarter thick, with a heavy forged knob at its central top, wherein fitted an iron swivel and a ring for hoisting. The bail weighed about 200 pounds. Pages 82-84, Transcript.

The bucket was swung in the great bail from pins of iron on each side so it would dump, and on one side a heavy iron catch or lock held the bail upright until the trigger in the catch or lock was operated when the bucket swung loose and if loaded would turn over and spill its contents. The two hopper men testified the catch, trigger or lock was out of order, causing the bucket to swing loose and voluntarily dump its load. Young at pages 71-74, and Klemm, page 179, Transcript. and both informed the defendants mate of that fact. Young at pages 69-70 and Klemm at page 214, Transcript.

Under these clearly established facts, the court properly refused to instruct the jury that McHugh had assumed the risks incident to the management of the iron bucket and its worn and broken catch, lock or trigger, with which he was totally unacquainted and with whose working he had no part or control.

Swenson v Bender, supra.

While we think the matter at issue is controlled by section 1 and 2 of the Federal Employers Liability Act of 1906, and by Territorial Act of 1913, supra, yet the case seems clear under the authorities cited by counsel for defendant. His first citation under this head is the case of Jacobs v. So. Ry. Co. 241, U. S. 229, 60 L. Ed. 970 and in that case the court held:

"2. A railway fireman injured by stumbling

over a pile of cinders between the tracks while attempting to board a moving engine with a can of drinking water in his hand assumes the risk of the situation when he knows of the custom to deposit cinders between the tracks, and knows of their existence, although he may have forgotten their existence at the time, and does not notice them."

On the next page counsel cites Butler v Frazer 211 U. S. 459, 53 L. Ed. 281, 285, as laying down the correct rule in such cases as that at bar. In this case the court said:

"Where the elements and combination out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employee must be held, as matter of law, to understand, appreciate and assume the risk of it. Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 49 L. Ed. 382, 25 Sup. Ct. Rep. 164, Fitzgerald v. Connecticut River Paper Co. 155 Mass. 31 Am. St. Rep. 537, 29 N. E. 464. The visible conditions may have been of recent origin, and the danger arising from them may have been obscure. In such cases, and perhaps others that could be stated, the question of the assumption of the risk is plainly for the jury. But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence, and adequate experience, and all these elements of the problem appear without contradiction, from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly."

Under the principles of law announced by the Supreme Court in the foregoing case, and the facts in the case at bar, it is plain there was no assumption of risk by the plaintiff McHugh and therefore no error in refusing to give defendants requested instructions.

The same conclusion must follow from an application of the quotation from the case of Seaboard A. L. R. Co. v. Horton, 233 U. S. 492. 58 L. Ed. 1062 found on page 67 of the Brief of Plaintiff in error in this case.

Counsel also complains at page 68 Brief that: "(C) Defendant was not a guarantor, etc." This matter was fully covered by instructions given by the court in No. 27 and other instructions. Page 432, Transcript.

The trouble with counsel's objections to the courts instruction is they object to an instruction and argue that, when other instructions given cure the very defect they attempt to argue. The instructions as a whole cover every objection made by counsel.

Swenson v Bender, supra.

X

Counsels tenth general proposition is that—"contributory negligence is a bar to recovery under the firse Employer's Liability Act, except where the employee's negligence is slight and the employers negligence is gross in comparison."

As we understood it, counsel base their com-

plaint to the instructions under this head, (page 75, Brief, last paragraph) on their own error in quoting only the last sentence from Instruction No. X page 421, Transcript, and then criticising the court for a supposed failure to give the first sentence. Counsel also makes this criticism at tence. Counsel also makes this criticism at page page 76, Brief: "The standard set up by the statute ie., slight negligence of plaintiff and gross negligence of the defendant, was thus eliminated and the jury virtually instructed that contributory negligence was not a bar if the plaintiffs negligence was slight, regardless of whether or not defendants negligence was slight, ordinary or gross. A new standard was set up, ie., a comparison between the plaintiffs negligence and the combined negligence of plaintiff and defendant."

Fortunately for the trial judge that error, if error it is, was not made by him, but by the Supreme Court of the United States in the case of Norfolk & W. R. Co v. Earnest, 229 U. S. 114, 57 L. Ed. 1096, 1101, where that court suggested and approved the use of those words in an instruction drawn under the second Employer's (Railroad) Act of 1908, in relation to the common phrase used in both Acts, and in the Territorial Act.

Counsel also criticise another instruction at the bottom of page 77 and top of 78, Brief, but, again, the language criticised is from Norfolk & W. R. Co. v Earnest, supra, as amended and approved in that case.

The liability of a steamship company for death of a sailor, injured while in its employ on a vessel operating as a common carrier in Alaska, is controlled by the provisions of Employer's Liability Act, June 11, 1906. Sec. 1-4.

Sandstrom v Pacific SS. Co., 260 Fed. 661.

A person who has a cause of action of admiralty cognizance has always been entitled to seek his remedy in either the common law courts, where they are competent to give it, or in the admiralty courts.

The Erie Lighter 108. 250 Fed. 490.

We think most of the voluminous objections made by counsel for plaintiff in error are within the brief but accurate syllabi in the case of Humes v United States. 170 U. S. 210. 42 L. Ed. 1101, as follows:

"1. The omission of the court to give instructions which are not asked for is not error.

"2. Instructions given, but not excepted to, are not subject to review.

"3. Refusal of instructions requested is not error, when the instructions already given are sufficiently full and elaborate.

"4. The court cannot consider whether the verdict was against the weight of evidence, if there was any evidence proper to go to the jury in support of the verdict."

Humes v. United States, supra.

XI

Counsels eleventh general principle seems rather self-evident, and his criticism is fully cov-

ered by instructions given by the court. Numbers VIII, IX and XII, pages 420-22, Transcript.

XII

The last general objection in counsels brief, page 81, is that: "the court should have directed a verdict for the defendant," upon which they proceed to reargue the case to this court on the evidence. The last item in the syllabi in the case of Hume v. United States, supra, is:

"4. The court cannot consider whether the verdict was against the weight of evidence, if there was any evidence proper to go to the jury in support of the verdict."

Certainly there was not only proper evidence to go to the jury in this case but an overwhelming weight of the evidence was in favor of the plaintiff.

In conclusion:

We submit that the Act of Congress of June 11, 1906—the first Federal Employers Liability Act, the same act re-enacted by the Territorial Legislature of Alaska in 1913, and thereafter given implied approval by Congress, the cases of Swensen v. Bender, 114, Fed. 1; Norfolk & W. R. Co. v Earnest, 229, U. S. 114, 57 L. Ed. 1096 and Hume v. United States, 170 U. S. 210, 42 L. Ed. 1011, conclude all questions raised by counsel for plaintiff in error, defendant below, in their brief. We have assumed that all questions not presented in their brief are waived.

Counsel for defendant in error, plaintiff below, submit the case to the judgment of the court on the record, the brief of opposing counsel, and this printed brief and argument, and waive oral argument.

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